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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

NO. 49

THE UNITED STATES OF AMERICA, *Petitioner*

v.

KANSAS CITY LIFE INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE KANSAS CITY LIFE INSURANCE COMPANY

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BRIEF FOR THE KANSAS CITY LIFE INSURANCE COMPANY

STATEMENT

There are some things about the petitioner's summary of findings of the Court of Claims which we think need clarification and we therefore make this additional statement of facts:

Petitioner's statement that the water table in respondent's land is now and always has been higher than the river stage is a correct statement of the findings of the Court of Claims; but the conclusion "hence water from the river has not been forced under respondent's land" is not a finding of the Court of Claims. In fact, the Court of Claims found to the contrary, ". . . The water in the sand is affected

by the rise and fall of the Mississippi River and the *water table under the land* rises and falls in response to high or low water conditions in the river. . . . It was found that when the river was low, the water table under the land was also low and when the river rose, the height of the water table increased, but the water table was always higher than the river except during the dry summer months when vegetation was extracting the water. . . ." (Fdg. 16, R. 30). (The italics are ours and this phrase is emphasized because petitioner in its statement of facts merely refers to the fact that the water in the sand is affected by the rise and fall of the Mississippi river.)

To illustrate what occurred we have attached as an Appendix, copy of Exhibit 29, one of the exhibits in this case although not brought up with the record. It is based on official Government records of the elevation of the river beginning with 1915 and running through 1945, at Dixon's Landing which the evidence showed had the same elevation as Dardenne Creek. The area shown in yellow indicates the times during the years 1915 to August, 1938, when the river was below 418.9 feet, the approximate level which is now kept at the dam. During much of the period before the dam was placed in operation the water was lower than 415 feet and often lower than 410 (it will be recalled that the lowest land was 422.7). The period from August 8, 1938 (when the dam was put in operation) through 1945 shows the water kept at 418.9 feet as it necessarily would be by the dam being kept in operation. The few times the water table is shown below this level is when the dam was out of operation for a short time. It will be observed from this exhibit that during practically the entire period before the dam was in operation, in the planting season in the spring and the harvesting season in the fall, the water was sufficiently low to allow plant-

ing and harvesting of the crops which, of course, is impossible now with the dam in operation. This is the basis of the finding of the Court as follows:

> . . .. Records of the river stages during those years reveal that there was almost always several months at the end of the year and about three months at the beginning of the year when the river stage was at an elevation of 410 feet or below. Under those conditions, an opportunity was provided for draining the surface and subsurface water from plaintiff's farm sufficiently for the planting, cultivation and harvesting of crops. Since the dam has been in operation, the conditions and the period of time, formerly available for draining the land and drying the soil, no longer exist (Fdg. 19, R. 32).

None of the land involved in this suit was below the high water mark of the Mississippi River. Of the land for which compensation was allowed the lowest was 423.5 feet (Fdg. 24, last Par., R. 34) and the highest was 425 feet (Fdgs. 26 and 27, R. 34, 35) which would mean that all of the land for which compensation was allowed is three to almost five feet above high water level and therefore is fast land. The finding of the Court was that the *ground water* in this land after the dam was placed in operation often reached a height of 422.5 feet (Fdg. 12, R. 27), which was two feet above high water level. As to the portion of the land for which the largest compensation was allowed, the Court held that the underground water table had been raised to within three feet of the surface of this land (Fdg. 26, R. 34, 35) which would be around one foot above the high water mark.[1]

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[1]The engineer's report in House Document No. 137, 72nd Congress, 1st Session, filed in 1931 and referred to in documents in evidence, states as to Dam No. 26 "The pool elevation proposed is 419 feet; this is about one foot above ordinary high water at

Counsel for Government refers to the fact that a portion of the land is valuable only as hunting preserve and its value has not been diminished by operation of the dam (Fdg. 24, R. 34). This is the land for which no compensation was allowed and is therefore not involved in this controversy.

Government's Counsel also refer to finding as to 302.96 acres of land in the sum of $1,694.60. This finding was also as to some of the lowest land on the farm and the Court merely exercised its judgment as to all of the testimony, in finding the amount of depreciation. This Court, and the Court of Claims, have always held that finders of fact have wide discretion in determining items of damage. The Court said the proof did not show the *exact* amount of the depreciation of this 300 acre tract. It did not say there was no proof of damage. Its finding of $1,694.60 is conclusive that there was evidence on which to base it.

On the question of the effect of the Act of Congress authorizing this project in accordance with the recommendations of the District Engineer there are several facts which are not clear from the statement of facts by the Government.

Since 1932, and perhaps earlier, the Congress had been attempting to get a full report as to what injury would be done to the land by the erection of the dam at Alton, and other places. The Committee on Rivers and Harbors of the House of Representatives at least twice sent a resolution to Government Engineers requesting that informa-

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the site" (page 120). This would mean that ordinary high water mark was 418 at Grafton, Illinois, the site of the dam, before the dam was erected, and the water was raised one foot above high water mark.

tion. These resolutions of the Committee on Rivers and Harbors clearly indicate that Congress was concerned about damage being done to these lands and recovery being prevented by some technical defense as to the nature of the taking. The resolution (prior to Document No. 34, 75th Congress, which Congress approved) requested the engineers to make a thorough examination "with a view to ascertaining as nearly as can be estimated the exact damage that may be caused to each of the levee and drainage districts bordering this river by seepage, back-water, and the *increased cost of drainage* that will be caused by the prosecution of the existing project, and the probable capitalized cost of reimbursing each of said districts for such damage". (Fdg. 7, R. 23) (The italics under the phrase in reference to drainage are ours as the Government in its statement of facts did not refer to this item).

On the basis of this resolution Army Engineers made a thorough investigation and filed with Congress what is known as Rivers and Harbors Committee Document No. 34, 75th Congress, dated June 1, 1936, which discussed the entire project on the upper Mississippi, including the particular property involved in this litigation. (Fdg. 8, R. 23) The document was of considerable length and shows very careful study of the question of drainage, seepage, back-water, and predicted exactly what happened in this case when the dam was erected. Among other things, the report, in referring to this property, said, ". . . Gravity drainage from the low-lying lands will be cut off when pool 26 is established. There are 1,254 acres of land which may be eliminated as agricultural land if funds are not expended for remedial works and 366 acres in addition which may be effectively drained by a combination of tiling and ditches" (Fdg. 8, R. 24). The engineers then went on to say that the cost of remedial works would exceed the cost of the land as to 1,254 acres and that there were 366

acres which might be saved by expensive drainage and the engineers recommended that money be paid this landowner for these items which the engineers estimated amounted to $93,540.

The recommendation of the District Engineer referred to six districts in addition to this one, and his recommendation that $624,645 be made available therefor immediately covered this item of $93,540 plus the cost of acquiring the six other properties which were in the same situation. Counsel for the Government seems to think there is some uncertainty as to what the District Engineer had in mind but that is plain from the record. He estimated that ditching and tiling the entire 1,620 acres (the two tracts of 1,254 and 366 acres respectively) would cost $81,000 (Fdg. 8, R. 24); that would be $50 an acre. He then figured that the installation of a pumping plant necessary if the 1,254 acres were to be kept in condition for agricultural use, would be very expensive—$2,339 a year. So he concluded that it would be better to pay to the landowner the $50 an acre on the 366 acres which would be $18,300, and buy the land outright. His basis for paying for the land can be determined by deducting $18,300 from the $93,540, which would be $75,240. Dividing this by 1,254 acres would mean that he expected to buy the land at $60 an acre. This estimate of the value of the land was made June 1, 1936.[2]

SUMMARY OF ARGUMENT

I.

There was a taking for which the Fifth Amendment requires compensation. The Government's defense to as-

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[2]Although not in the record, files of the engineers' office will show that this $93,540 was based on $60 an acre for the 1,254 acres, and $50 an acre for the 366 acres, which will total the $93,540.

serted taking in a case of this sort may assume two forms: (1) that there was no taking in a physical sense, as for instance the land was not touched or that there was a mere threat of taking; (2) that there was no taking because the Government exercised its dominant authority over a navigable stream and was therefore acting in pursuit of its legal rights, since one cannot take his own property. We shall discuss these two forms of taking in their order.

Land is taken "when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time." *United States* v. *Dickinson*, 331 U. S. p. 748. *United States* v. *Cress*, 243 U. S. 316, held that the right to have a nonnavigable stream flow away from one's land unobstructed except in the course of nature, was an interest in land, the destruction of which was a taking. This is also the law of Missouri and of many other states. Other decisions of the Supreme Court of the United States (*United States* v. *Williams*, 188 U. S. 485; *United States* v. *Lynah*, 188 U. S. 445) have held that causing injury to land by percolation, seepage and destruction of drainage where the agricultural value of the land was destroyed, was a taking for which compensation must be paid. In this case, there was not only destruction of drainage, there was pushing of water up into the land by increased height of the river and of holding it there so that water rose in the land and rendered it unfit for agriculture.

As to the second aspect of taking, although the Government has a dominant right as to subsurface land (land below high water mark) on a navigable stream, it has no such dominant right as to land on a nonnavigable stream. *Scranton* v. *Wheeler*, 179 U. S. 141, and other cases which established this rule of dominant right, hold that a riparian owner on a navigable stream owns the land

in the bed of the stream under a qualified title and always subject to the Government's right to use of the river for navigation. The *Cress* case, *supra*, held that the Government was liable for exercise of its power to regulate navigation if the exercise of that power caused a taking of land on a nonnavigable stream. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592, involved injury to land in the bed of a stream, caused by raising the waters of a navigable stream to high water mark. It distinguished that case from the *Cress* case on the ground that the *Cress* case involved land on a nonnavigable stream and stated that the *Cress* case held where owner was on a nonnavigable stream he was entitled to compensation, and in *United States* v. *Willow River Power Company*, 324 U. S. 499, a case involving liability for changing the level of a navigable stream this Court construed the *Cress* case as holding that the right of the Government on a nonnavigable stream was not a dominant right and its rights and liabilities were governed by the rights and liabilities of other riparian owners. Under Missouri law and under the law of most states, a riparian owner has no right to dam a nonnavigable stream to the injury of other riparian owners on such navigable streams. There is undoubtedly liability as between riparian owners; hence there is liability here.

There was taking in this case even if there be no difference in the rule as to navigable and nonnavigable streams, because the injury was to fast lands. All of the land taken is above high water mark, which is 420.4 feet. The ground water in this land often rose to 422.5 feet. All of the land now involved was from 423.5 to 425 feet which is from a little over three to over four and one-half feet. The Courts have held that even on a navigable stream the Government is liable for taking of fast lands.

II

The description of the right taken, as found by the Court of Claims, is adequate. The finding of fact showed the property taken and the nature of the taking. The real objection seems to be to the word "privilege," defined by Webster as "a grant of a special right or immunity." If the word grant or right had been used the description given would have been that of an ordinary easement. No particular form of words is necessary to describe an easement.

The Government has the privilege of erecting and operating a dam on the Mississippi River without paying compensation to an owner of land on that navigable stream, even though, if the water is not raised above high water mark, his land may be injured or destroyed thereby. The Government does not have the privilege of doing so *without compensation*, if land injured or destroyed thereby, is located on a nonnavigable stream away from the Mississippi river. And the Court of Claims did not allow compensation for the "privilege". The compensation was allowed for taking the land.

III

The District Engineer of the War Department, after a thorough investigation of what injury this project would do to the land by seepage, backwater and cost of drainage, reported to Congress that a substantial part of the farm (1,254 acres) would be eliminated for agricultural purposes if the dam were erected and put in operation, and that some 366 acres would require expensive tiling and drainage. He therefore recommended that the Government pay to the landowner the cost of acquiring the 1,254 acres and the cost of tiling and drainage of the 366 acres, and that the money be made available therefor im-

mediately. Upon receiving the report, Congress authorized the project as recommended by the District Engineer. Congress therefore has directed payment for injury to this land even though what was done did not constitute a taking.

IV

The Tucker Act provides for recovery against the Government "upon any contract, express or implied, with the Government of the United States" (Mar. 3, 1887, c. 359, No. 1, 24 Stat. 505; Mar. 3, 1911, c. 231, No. 145, 36 Stat. 1136). The facts in this case establish an implied contract by the Government to pay for the injury to this land.

ARGUMENT

I. THERE WAS A TAKING FOR WHICH THE FIFTH AMENDMENT REQUIRES COMPENSATION

A. The United States by erection and operation of Lock and Dam No. 26 caused pushing up of water into the soil, percolation, seepage, and destruction of drainage

In the summary we have referred to the two aspects of taking. The Government relies expressly upon the second of these aspects of taking. But in the notes attached to Government's brief a great deal of time is spent urging there was no actual taking of the land. For this reason we will devote a portion of our brief to that question.

The Government asserts that this is a question of Government depriving this landowner merely of the right to drain his land through Dardenne Creek which empties into the Mississippi River. It is our view that under the authorities, where the stoppage of drainage results in complete water-logging and soaking land to the extent that it cannot be cultivated, this in itself constitutes a taking. This was the basis of the decision of the Court

of Claims, ". . . We see no real difference between burdening the land by artificially flooding it with water, which has often been held to be a taking, and converting it into a pond or a marsh by preventing the surface water which falls on it or flows on it, from higher land from leaving it by either surface or underground drainage" (Opinion of Court R. 38. 109 C. Cl., p. 575). But there is involved here more than a question of depriving the respondent of drainage to his land. The Court of Claims found that the ground-water in this land rose and fell as the river rose and fell. That would mean that since Dam No. 26 resulted in raising the river level and therefore the level of Dardenne Creek five feet it would raise the ground-water level in this land five feet.

Flooding the top of the land stops drainage but that is merely one cause of injury. The flood-water itself injures and ruins the land. Exactly the same thing applies when water comes from below, up into the land. That also stops drainage and prevents water coming through but there is the added water brought about by pressure from increased height of water in the river. As petitioner has stated in several places, water seeks its level and the finding of the Court which is simply a statement of the law of nature that ground water in the land rises as the river rises proves that water pushes up into the land when the height of the river is increased. In the normal rise of the river to highwater mark, where there is no dam to keep it there permanently, the ground-water will level off with the water in the river at a height below high-water level. But when the dam permanently holds this water at around 420 feet the result is a permanent keeping of the ground-water in this soil at 420, or usually above. Comment has been made about the finding that the water in the ground is higher than the water

in the river. This is based on recognized principle of physics known as capillary attraction. The water held in the land by reason of this pressure is drawn up a foot or more by capillary attraction. This is not peculiar to this land.

United States v. *Williams*, 188 U. S. 485, involved a situation almost exactly the same as in the case at bar which was held to be a taking. The facts are not set out in the decision of the Supreme Court. But from the Court of Appeals decision, *Williams* v. *United States*, 104 Fed. 50, p. 53, they appear to be as follows:

> The facts found show that by reason of the obstructions so placed in the Savannah River and the dumping of mud and sand therein, the water of the river has been directly backed up and against the banks of this plantation, and forced on the land; the superinduced addition of water actually invading it, destroying its drainage, and through seepage and percolation raising the level of the water within the plantation to the level of the water in the river, and, in addition thereto, holding back and restraining in, over, and upon said plantation the freshets, the water from which was retained upon the same; by all of which the plantation has been rendered absolutely valueless. All of which is the result of the Government improvements and works, and without which its purposes could not be carried out and effected. This is a "taking," within the meaning of the fifth amendment.

Seepage, percolation, and destruction of drainage, were also involved in *United States* v. *Lynah*, 188 U. S. 445, pp. 468-70, and this damage, with some overflow, which together rendered the land an irreclaimable bog, was held to constitute a taking.

In *Cress* v. *United States*, 243 U. S. 316, a dam placed in the Kentucky River caused Miller's Creek, a non-

navigable stream, to rise to such an extent that the owner's mill dam, situated thereon, could not be operated because the increased height of the water in the creek prevented the drop in the current necessary to run the mill. No part of the land or the mill was overflowed. The Court held this to be a taking. It said:

> . . . The right to have the water flow away from the mill dam unobstructed, except in the course of nature, is not a mere easement or appurtenance, but exists by the law of nature as an inseparable part of the land. A destruction of this right is a taking of a part of the land. . . . (243 U. S. p. 330).

In discussing the question the Court (p. 325) referred with approval to the holding of the *Lynah* case that backing water up against the landowners' embankment and interfering with drainage of their plantation was a taking.

The *Williams*, the *Lynah*, the *Cress* cases together establish without question that seepage, percolation, and prevention of drainage, caused by a dam erected by the Government, constitute a taking if the land is seriously depreciated in value thereby.

Have any of these decisions been overruled? The *Williams* case has not been referred to again by this Court. The *Lynah* case has been questioned, debated, construed and interpreted, but it still remains the law on the question of taking. It was overruled in the *Chicago, M., St. P. and P. R. Co.* case, as to that part of the opinion holding the Government liable for injury to land in the bed of a navigable stream for raising its level to high water mark. But that case recognized as correct its decision on the question of taking (312 U. S. 592, p. 598); in *United States* v. *Dickinson*, 331 U. S. 745, p. 748, it was cited on the question of jurisdiction, and in *United States* v. *Causby*, 328 U. S. 256,

p. 261, Note 6, it was cited with approval, on the question of taking.

The *Cress* case has also been discussed in many decisions but never questioned on the principle of what constitutes taking and was quoted in *United States* v. *Causby*, 328 U. S. 256, p. 266, on its doctrine "it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial that determines the question whether it is a taking". What possible difference could it make whether the flooding came from above the ground or below, if the effect is destruction of the land?

Many years ago the New York Court of Appeals took the view that there was no difference in a case where underground water had caused damage. It stated the doctrine as follows:

> . . . To hold that defendants would be liable, if their interference with the surface stream had damaged the plaintiff, by overflowing the natural banks and pressing it through the artificial embankment, but not, if they pressed it through the natural banks, would be about as sound legal justice, to my mind, as if we should hold a man liable for stabbing another in the bosom, but, if he stabbed him under the arm, though the knife should come to the same point in the body, there should be no liability . . . (*Pixley* v. *Clark*, 35 N. Y. 520, p. 530).

The Iowa courts, in a carefully considered case, *Healey* v. *Citizens' Gas & Electric Company*, 201 N. W. 118, p. 121, 199 Iowa 82, p. 90, have held likewise:

> . . . The *Pixley* case, and some of the other cases, hold that there is no difference in flooding one's land, whether it is by overflowing or underflowing (percolation). The water reaches the land, and injures or destroys its use, in either event. . . .

This Court, in the recent *United States* v. *Causby*, 328 U. S. 256, has established the doctrine that the old idea of taking, as a highly technical question requiring an actual physical invasion of the land, is no longer the law in this country. In that case, taking was asserted because airplanes were flown over chicken farm at a height of 83 feet (which was 63 feet above the barn and 67 feet above the house) causing chickens to be frightened and killed and rendering the property useless as a chicken farm. The land was not touched, the title was retained by the owner. The Government contended there was no taking and that the injury was consequential. The Court held that if by reason of such flights the owners could not use the land for any purpose the loss would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it. The Court said that the fact that planes never touched the surface "would be as irrelevant as the absence in this day of the feudal livery of seisin on the transfer of real estate" (p. 262).

This is precisely the situation in the instant case except that the injury was done by water from 3 to 5 feet under the ground. But if the Government's action 83 feet above the ground is a taking, certainly its action 3 to 5 feet under the ground is likewise so.

The fact that the owner is still in possession and that the land may have some value as a duck hunter's pond does not change the liability if part of its value has been taken. As said in the *Causby* case, p. 262, *supra*, ". . . The path of glide for airplanes might reduce a valuable factory site to grazing land, an orchard to a vegetable patch, a residential section to a wheat field. Some value would remain, but the use of the airspace immediately above the land would limit the utility of the land and cause a diminution of its value. . . ."

Partial taking is recognized in all the cases: *Jacobs* v. *United States*, 290 U. S. 13, p. 16, *United States* v. *Cress*, 243 U. S. 316, pp. 327-329, as is liability for taking of an easement, *United States* v. *Welch*, 217 U. S. 333.

The Government asserts there was no invasion of this land. If holding water continuously within three feet of the surface, which the Court found made the land unfit for agriculture, does not constitute an invasion of the land it is inconceivable what would. If this were due to destruction of an easement as in the *Welch* case, or had the effect of creating an easement as in the *Causby* case, it is none the less a taking. If "respondent could not use this land for any purpose, their loss would be complete". If "some value would remain it would nevertheless 'limit the utility of the land and cause a diminution in its value' ". In any event it would be a taking.

The difference between taking and damage is illustrated in *Peabody* v. *United States*, 231 U. S. 530 and in the two *Portsmouth* cases. In the *Peabody* and the first *Portsmouth* (250 U. S. 1) cases, only a few shots were fired over the land. This was held to be not sufficient to create a servitude. But when the firing became permanent, continuing day after day, the Court held it did become a servitude and constituted a taking. (*Portsmouth Harbor Land & Hotel Company* v. *United States*, 260 U. S. 327). If the Government had merely raised this river on one occasion causing damage to crops it would not have been a taking of the land. But when as a part of a permanent policy of the Government already continued in effect for ten years the river is kept at such level as to destroy the land for farming purposes, and such policy is to continue from now on it certainly becomes a taking.

On the question of taking by destroying subsurface drainage the petitioner cites three cases, all of which are distinguishable from the instant case.

(1) In *Lynn* v. *United States*, 110 F. 2d 586, the land was on a *navigable* stream and the decision was based on the dominant right of the Government on such streams and not on the question whether injuring the drainage was a taking. In that case, also, the Government had paid for the land and covered by that payment, the damage claimed.

(2) In *Christman* v. *United States*, 74 F. 2d 112, flash floods rushing down a comparatively steep descent swept over the land doing serious damage and the Court held that the flood, not the dam, caused the injury.

(3) *United States* v. *Meyer*, 113 F. 2d 387, holds that an interference with subsurface drainage is not a taking within eminent domain power. The facts in that case were not stated; it does not appear whether the stream was navigable or nonnavigable; the cases cited were not subsurface drainage cases. It is, therefore, of little value and is in conflict with the Supreme Court cases heretofore cited.[3]

On questions of access and what are sometimes referred to as intangible rights, on which there are several Supreme Court cases which hold there is no right to recovery, it must be borne in mind that all of these

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[3]There are many decisions of United States District and Circuit Court of Appeals sustaining respondent's position that injury to the land of the character shown in the instant case, is a taking. *United States* v. *Chicago, B. & Q. R. Co.*, 82 F. 2d 131, p. 139; *United States* v. *Wabasha-Nelson Bridge Co.*, 83 F. 2d 852, p. 854; *United States* v. *Chicago, B. & Q. R. Co.*, 90 F. 2d 161, pp. 169, 170; *King* v. *United States*, 59 Fed. 9, p. 12.

cases involve property on a navigable stream and the question is so intermingled with dominant right of Government to utilize navigable streams in the interest of navigation that they are not really cases sustaining the view that in other situations, not involving that dominant right, recovery cannot be had for deprivation of access. For instance, in *Mills* v. *United States*, 46 Fed. 738, one of the cases relied on by the Government, the land was on the navigable tidewater of the Savannah River and plaintiffs asserted the right to the continued use of the ebb and flow for their drainage. The case was decided on the basis that "all the right they have in the ebb and flow of the tide of the Savannah River is subordinate to the control of the Government over that navigable stream, for its free navigation for the public" (p. 747) and in discussing the question of destruction of drainage the Court said (p. 738):

> . . . It would seem to be otherwise if the stream were not navigable, but upon navigable waters any franchise depending upon the use of the stream itself seems to be common to all, and to relate to the purposes of navigation and to facilities therefor. . . .

In the *Willow River Power Company* case, also, the Court refers to the Government's right to change the level of a navigable stream and its lack of such right in a nonnavigable stream (324 U. S. p. 506). In all of these cases it is specifically stated that the land has not been touched or injured in any way. In the instant case the land has been made into a pond or a marsh as the Court of Claims found (R. 38).

The rule established in the *Cress* case, previously quoted, that an owner of land has the right to have a nonnavigable stream flow away from it unobstructed except in the course of nature, is generally established by

many cases. It is the rule in Missouri. In *Greisinger* v. *Klinhardt*, 321 Mo. 186, p. 193, 9 S. W. 2d 978, p. 980, the Court said, ". . . The right to the flow of a natural non-navigable stream, in its natural way, applies to upper and lower owners of land across which the stream flows . . .".[4]

Nor can one, under Missouri law, dam a nonnavigable stream and cause water to flow back on another's land. (*Keener* v. *Sharp*, 341 Mo. 1192, p. 1195, 111 S. W. 2d 118, p. 120). After stating that in Missouri surface water is a common enemy which every man may ward off providing he does not unnecessarily collect it and discharge it to the damage of his neighbor, the Court says: "It is also settled in Missouri that a natural stream cannot be dammed up nor the waters from its beaten path or bed diverted to the damage of property without compensation therefor. . . ", and that the waters of a stream "may be made up, more or less, from surface water from rains and melting snow, but after it enters into a channel and commences to flow in its natural banks, it is no longer to be considered surface water, . . .". (341 Mo. p. 1196, 111 S. W. 2d, p. 120).

In one of the notes of Government's brief, suggestion is made of consequential damage as distinguished from taking. Consequential damage is a term of such uncertainty and of such conflicting meaning that it is difficult to determine its application in a particular case. We do not think, however, that it applies in this case in any way.

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[4]That this is the general rule is evidenced by many cases. A few of the most recent are: *Olson* v. *Roscoe*, 30 N. W. 2d 664; *Larson* v. *Remeikis*, 76 N. E. 2d 922; *Turner* v. *Hopper*, 188 Pac. 2d 257; *Reese* v. *State*, 72 N. Y. S. 2d 209; *Logsdon* v. *Anderson*, 30 N. W. 2d 787; *De Ruwe* v. *Morrison*, 184 Pac. 2d 273; *Schmahl* v. *Ackerson*, 74 N. E. 2d 614; *Beals* v. *Robertson*, 52 Atl. 2d 316, 356 Pa. 348; *Costello* v. *Bowen*, 182 Pac. 2d 615.

It is sometimes used in connection with cases where the Government has exercised its dominant right to raise the level of a navigable river and is there used to mean the damage consequent upon the Government doing an act in pursuance of its legal right or easement in the property. That meaning would not apply here. It is also used in reference to an injury done which could not have been anticipated. The leading case on this subject, *Hadley* v. *Baxendale*, 9 Websby, Hurlstone & Gordon's Reports (Exchequer) 341, decided in England in 1854, established this principle. Such also was *Sanguinetti* v. *United States*, 264 U. S. 146, pp. 147, 148, where the Court said:

> It was not shown, either directly or inferentially, that the Government, or any of its officers, in the preparation of the plans or in the construction of the canal, had any intention to thereby flood any of the land here involved, or had any reason to expect that such result would follow. That the carrying capacity of the canal was insufficient during periods of very heavy rains and extremely high water was due to lack of accurate information in respect of the conditions to be met at such times. . . .

This was the basis also of the *Horstmann* case, 257 U. S. 138. But in the instant case the Government not only could have, but did anticipate what occurred, as evidenced by the extensive report of the engineers approved by Congress.

One other phase of consequential damage is sometimes referred to where an independent agent intervenes and it, and not the act complained of, causes the injury. Such a situation would arise, if, after a dam was put in operation a flood occurred which swept everything before it and would have destroyed the land whether the dam were there or not, and though the dam may have

contributed something to the injury, that contribution was negligible and would not have caused the injury. Such was *Christman* v. *United States*, 74 F. 2d 112, cited by Government where a flash flood swept down from the hills with great suddenness and really caused the injury. That is certainly not the situation here where the erection of the dam and the resulting elevation of the water raised the ground water in the land and holds it so that the land is rendered valueless for farming purposes. In the *Causby* case the same question was raised, and the Court said that the damages were not merely consequential but were a product of a direct invasion of respondent's domain, even though the land was not touched (328 U. S. pp. 265, 266).

B. The United States must pay compensation since it raised the waters of a nonnavigable stream to high water mark, destroying the land for agricultural purposes

The second aspect of taking, the question of the dominant right of the Government to utilize a navigable stream up to high water mark without liability, is the point stressed by the Government. Does the limited right of the riparian owner on a navigable river to the submerged land in front of his fast land as against the dominant right of the Government, apply to an owner on a nonnavigable stream?

Under Missouri law a riparian owner on a navigable river holds title to low water mark (*Hartvedt* v. *Harpst*, 173 S. W. 2d 65, p. 69). On a nonnavigable stream he has title to the whole bed if the entire stream is on his property and to the thread or middle of the stream if the stream runs between his land and that of another (*Brown* v. *Wilson*, 348 Mo. 658, p. 665, 155 S. W. 2d 176, p. 179).

For many years it has been the rule that the owner of land on a navigable stream (even though under state law he has title to the land between high and low water

mark) has only a limited title to the submerged land subject always to the dominant power of the United States to do whatever may be necessary as to the navigable stream in the interest of navigation. Perhaps the clearest statement of the rule is that made in *Scranton* v. *Wheeler*, 179 U. S. 141, p. 163:

> . . . The primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation. . . .[5]

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[5]This rule has been applied in several types of cases:

(1) Where buildings erected between high and low-water mark of a navigable stream are destroyed: *Greenleaf Johnson Lumber Co.* v. *Garrison*, 237 U. S. 251; *Willink* v. *United States*, 240 U. S. 572; *Lewis Blue Point Oyster Culture Co.* v. *Briggs*, 229 U. S. 82; *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592, p. 599.

(2) Where riparian owner is deprived of access to navigable stream, but the land is not touched: *Scranton* v. *Wheeler*, 179 U. S. 141; *Gibson* v. *United States*, 166 U. S. 269; *United States* v. *Commodore Park*, 324 U. S. 386, p. 390.

(3) Where the Government deprives the riparian owner of the previous flow of the navigable river: these are mostly waterpower cases but they emphasize another phase of the dominant power of the Government over navigable water: *United*

It will be noted that the basis of this rule is that the owner of land on a navigable stream does not have, so far as the Government is concerned, a complete title to the land between low and high water mark. He buys the property with the easement of dominant right of the Government qualifying his title. It is just as if he had bought land on which there was an easement of record and when he buys the land just in the same way as any limitation of title will qualify his right, so he buys this land subject to that qualification. There is a definite reason for this rule. First, from the Government's standpoint, the stream is a navigable stream over which the Government has complete control and always has had and that control means the right to alter, divert or dam the stream whatever may be the effect of same on the riparian owners' lands between low and high water mark. Second, one who buys real estate on a navigable stream is instantly put on notice

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States v. *Appalachian Electric Power Company*, 311 U. S. 377, p. 423; *United States* v. *Willow River Power Co.*, 324 U. S. 499. And this rule is true even if the flow of the river is in excess of needs of navigation: *United States* v. *Chandler Dunbar Water Power Company*, 229 U. S. 53.

(4) Where the Government erects levees on navigable streams to protect against floods and extraordinar, water rises: *Jackson* v. *United States*, 230 U. S. 1; *Hughes* v. *United States*, 230 U. S. 24; *United States* v. *Sponenbarger*, 308 U. S. 256; *Cubbins* v. *Mississippi River Commission*, 241 U. S. 351, p. 363.

Bedford v. *United States*, 192 U. S. 217, was also a case of dominant right of the Government in a navigable stream. The injury was due to natural causes (the Mississippi having changed its course by cutting through a narrow neck of land and through the course of years injuring claimant's land by erosion) but claimant undertook to establish injury on the basis of what the river might not have done if the Government had not placed a revetment along the shore some distance from claimant's land after the river broke through. The Court held this entirely speculative.

that the Government must necessarily regulate, alter, divert or place a dam in the stream if commerce and navigation require it. For he has but to look out upon this large stream with river traffic upon it and power potentialities apparent, to see the necessity for the exercise of the Government's power over navigation. He knows he cannot use this stream or the land under it as he can his upland, just as one owning land adjacent to a public highway knows he cannot place his buildings out in the highway. But, because of the many advantages of the navigable stream for power, for docks and for shipping, he is willing to buy and assume the risk of the Government taking action which may curb his activities. For, even with the restrictions on his submerged land, he has a property much more valuable to him than property some distance inland.

Neither of these reasons apply to one who buys farm land inland a mile and a half or more back of the navigable stream. We do not say that circumstances cannot arise under which the Government may have the power to regulate a tributary of a navigable stream, where the safety of the public is at stake. But here is a creek, 2 or 3 feet deep as the Court found, and a mile and a half from the navigable river. It is hardly conceivable that any interests would be involved except those of the farmers who operate along this creek, who perhaps water their stock there, or drive their cows across it and utilize it as any farm property. And there is certainly no reason that anyone buying a farm here would be put on notice of any power of the Government to regulate this small creek in the interest of navigation. He buys seeking no advantage of the navigable stream, he assumes no risk going with the advantages of a navigable stream.

It seems to us entirely logical that the farther away from the river one is the greater his right to be free from injury to his land by the Government.

In every instance where this dominant power has been sustained, the land has been on a navigable stream and in every such instance the Court has commented on the fact that no fast land or land above the high water level has been touched. Typical of the cases which have sustained this right of the Government to take without compensation is the case of *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592, where the *property injured was in the bed of the stream* between low and high water mark. The railroad had built its tracks placing them on an embankment and riprapped the embankment so as to protect it from water. The court very properly held that the railroad's title to land in the bed of the stream was a qualified right always subject to the superior right of the Government.[6]

This Court, in *Chicago, M., St. P. & P. R. Co.*, (312 U. S. p. 597) referring to the *Cress* case said:

> . . . In that case, the Government's improvement in a navigable stream resulted in the flooding of the plaintiff's land in and adjacent to a non-navigable stream. The owners of the land along and under the bed of the stream were held entitled to compensation for the damage to their lands. . . .

And it was because in the *Cress* case the land was on a nonnavigable stream and the land in *Chicago, M. St. P. & P. R. Co.* case on a navigable stream that the *Cress* case was held to be not applicable.

Counsel for Government devote a considerable part of their brief to the contention that the *Cress* case was not one where low and high water mark was considered. We have not cited the *Cress* case as one involving high

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[6]This was the situation also in *Hood* v. *United States*, 49 C. Cls. 669 and *Kelley's Creek and N. W. R. Co.* v. *United States*, 100 C. Cls. 396, cited by the Government.

and low water mark. What we do say is that it establishes a principle which is applicable to high and low water mark cases. For, as construed by later decisions of this Court, the *Cress* case establishes the doctrine that the dominant right of the Government as to a navigable stream does not extend to a nonnavigable stream. And as the right of the Government to raise the waters of a river to high water mark is based solely on such dominant right, it necessarily follows that the effect of the establishment of this principle in the *Cress* case would be that the Government does not have the right to raise the water to high water mark on a nonnavigable stream without compensation, if a taking results. The Government says that the *Cress* case does not decide that the rights on a nonnavigable stream are different from those on a navigable stream. Our best answer to this is that this Court says that it does.

In *Willow River Power Company* case, also relied upon by the Government, the land was on a navigable stream and the court specifically distinguished the case from the *Cress* case on the basis of that "case having to do with the land on a non-navigable stream."[7] The court definitely distinguishes between the dominant right of the Government as to land on a navigable stream and its right in a nonnavigable stream (324 U. S. pp. 505-506):

> The doctrine of riparian rights attained its maximum authority on nonnavigable streams. No overriding public interest chilled the contest between

[7] In *Willow River Power Company*, case, there are several differences from this case. In the first place, Willow river had been itself changed and the owner had created an artificial flow of the stream higher than its natural flow. It is specifically stated that no fast lands were flooded or injury done to the property or any use of it other than the right to use the river for power.

owners to get the utmost in benefits from flowing streams. Physical conditions usually favored practical utilization of theoretical rights. In general nonnavigable streams were small, shifted their courses easily and were not stable enough to serve as property lines as larger streams often do. They were shallow, could be forded and were no great obstacle to tillage or pasturage on two sides of the stream as a single operation. Such streams, like the lands, were fenced in; and while the waters might show resentment by carrying away a few spans of fence in the spring, the riparian owner's rights in such streams were acknowledged by the custom of the countryside as well as recognized by the law. In such surroundings and as between such owners equality of benefits from flowing waters was sought in the rule that each was entitled to their natural flow, subject only to a reasonable riparian use which must not substantially diminish their quantity or impair their quality. It was in such a stream that this Court found Cress as a landowner under the law of Kentucky possessed "the right to have the water flow away from the mill-dam unobstructed, except as in the course of nature." 243 U. S. 316, 330.

Referring again to the *Cress* case the Court said (p. 506):

> . . . The Government there was charged with the consequences of changing the level of a non-navigable stream; here it is sought to be charged with the same consequences from changing the level in a navigable one. In the former case the navigation interest was held not to be a dominant one at the property damaged; here dominance of the navigation interest at the St. Croix is clear.

The Court further held that in the *Cress* case the rights of the riparian owner against the Government improving navigation was measured by the standard evolved to measure the rights of riparian owners against each other and that the Government on such a stream was,

under the *Cress* case, held to have no greater rights than the riparian owner and therefore, not paramount to the rights of Cress (324 U. S. p. 506). If this does not clearly establish the rule that the right of the Government is not dominant as to land on a nonnavigable stream and that the rule set forth in the line of cases illustrated by *Scranton* v. *Wheeler* does not apply to land on a nonnavigable stream we do not see how words could be used to convey that fact.

Even in the *Causby* case where rights in the air were involved the Court distinguished between "navigable airspace" (300 to 1000 feet) which Congress placed within the Public Domain and space below (324 U. S. pp. 263, 264). The lower air space was that which the planes invaded in that case. The effect of this distinction was to hold that if the air invaded was not "navigable airspace" it was not subject to the dominant right of the Government.

C. There was liability since injury was to fast land

Even if it should be assumed that there is no distinction between riparian rights on navigable and nonnavigable streams, it should be noted that the injury in this case is to fast land. High water mark at Dardenne Creek as found by the Court was 420.4 feet. The lowest land for which the Court allowed compensation was 423.5 feet and most of it between 424 and 425 feet. So that the land injured was 3 to 4½ feet above high water mark. The water was often as high as 422.5 feet and was kept permanently at 421 (within 3 feet of land at 424) which is almost one foot above high water on a large tract of land involved. As this Court said, in referring to land on a navigable stream,

> ". . . High-water mark bounds the bed of the river. Lands above it are fast lands and to flood them is a

taking for which compensation must be paid. . . ." (*United States* v. *Willow River Power Company*, 324 U. S. 499, p. 509).

II. FINDING OF THE COURT OF CLAIMS IS ADEQUATE AS TO WHAT PROPERTY INTEREST WAS TAKEN

Petitioner, under Point II of its brief, as we understand it, asserts a failure of the Court below in its findings accurately to describe the property or interest taken and, reasoning from that false assumption, argues that the compensation awarded respondent in the judgment, not being awarded for any particular property or interest taken, necessarily amounts only to a penalty imposed upon the Government for the "privilege" of carrying on the Governmental activity of improving navigation on the Mississippi River, a "privilege" paramount in the Government and one over which respondent exercised no right or control and for the exercise of which respondent could exact no compensation. This assumption or premise is untenable and the argument unsound.

In Findings 24, 26 and 27 (R. 34, 35) the Court below specifically described the three tracts of land for the taking of which compensation was awarded. Two plats are made part of findings. These plats are based on extensive surveys of the Government and are a part of the record here. By referring to them, anyone could locate the land for which compensation was awarded. The nature and extent of the taking is set out and described in Findings 18, 19 and 20 (R. 31, 32) and is found to consist not only of obstructing and delaying the drainage of surface water from respondent's land but as well, a shutting off almost entirely, of the drainage of underground water from the land, as well as an invasion of the land itself by underflooding and raising the water table under the land from four to five feet higher than it was prior

to the erection of the dam. It is this invasion or taking of respondent's property interest in the land in question, a permanent condition, which the Court below found was directly attributable to the exercise by petitioner of its privilege of permanently maintaining Lock and Dam No. 26 at their present height, and operating them in such a manner as to fulfill the purposes of their construction, for which compensation was awarded. It will be seen immediately that, contrary to petitioner's argument, compensation was awarded not for petitioner's "privilege" of carrying on the governmental activity of improving navigation in the Mississippi River, as to which its right is paramount, but on the contrary was awarded for the taking of a fixed and determinable property or interest in the land in question (which was on a nonnavigable stream) resulting from the exercise by petitioner of that "privilege" for which the Constitution requires compensation.

In that part of the opinion of the Court of Claims describing the legal effect of the property interest found to have been taken, it said, ". . . It is the kind of an incident of ownership that could have been granted by the plaintiff to the Government or a neighbor, the privilege of holding surface and underground water in the plaintiff's land, to its detriment as agricultural land. Such a grant would have created a burden *in rem* upon the plaintiff's land, which would have passed to subsequent owners and bound them. . . ." *Kansas City Life Insurance Company* v. *United States*, 109 C. Cls. 555, p. 575 (R. 37, 38). But the property taken and the method of taking are described in the findings of fact.

An easement is not required to be expressed in any particular language. If the language sets forth in clear terms what the rights of the parties are, it will constitute

an easement even though the word "easement" is not used. The only reason for any discussion is the use of the word "privilege."- Webster defines "privilege" as a "grant of a special right or immunity." Suppose the word "grant" or "right" were substituted for "privilege" so that the language of this finding should read, "The right exercised by the Government for which the plaintiff is given compensation in this case is the right granted to it, of permanently maintaining . . . .", *et cetera*. That would involve the ordinary language of an easement. But it would be no clearer and mean nothing more than the finding which the Court below has made. This finding, and it is contained in the findings of fact and not in the opinion, definitely described a permanent easement, the language being "permanently maintaining" and refers to both present and future use at its present height. The height at which the dam may be maintained is described as its present height.

Petitioner complains that the finding of the Court of Claims improperly limits the Government's "privilege" to "permanently maintaining Lock and Dam No. 26." The only issue in this case pertains to the taking of plaintiff's property or interest in the land in question, and compensation therefor, resulting from the construction and operation by the Government of Lock and Dam No. 26. The findings were responsive to that issue. The extent of the invasion or taking of respondent's property as a result of the construction and operation of that dam has been found and determined. If later the Government builds and operates other dams affecting this same property but with no further underflowing or taking of respondent's property and interest therein, then respondent can claim no further compensation for the present invasion or taking which has been bought and paid for by this award. Such, however, is not the issue in this case. The issue is as to the destruction and taking of respondent's property or

interest in the lands in question resulting from the Government's construction and operation of Lock and Dam No. 26. The findings and judgment of the Court of Claims are properly responsive to that sole issue. A broader finding would be unwarranted and a narrower finding not sufficient.

III. THE COURT OF CLAIMS WAS AUTHORIZED TO RENDER JUDGMENT FOR RESPONDENT ON BASIS OF ACT OF CONGRESS WHETHER OR NOT THERE WAS A SERVITUDE OF THE GOVERNMENT OR A TAKING

The Government concedes that Congress may by legislation waive Government immunity and make itself liable in cases where normally it would not be held so. It contends that in this case there has been no such waiver by Act of Congress.

We have stated the facts. The report of the District Engineer advised Congress that seepage, backwater and injury to drainage would completely eliminate for agricultural purposes a large part of this land (1,254 acres) and that 366 acres could be saved only by expensive tiling and drainage, and recommended that the Government pay to the owner the price of the land and the cost of drainage which would be much less than the expense to the Government in doing the remedial work on the entire 1,620 acres. And he recommended that this money, including money for six other districts, be made available immediately. It is quite evident that the District Engineer intended that the money be made available so that these amounts could be paid forthwith to the various claimants. Otherwise, there would have been no reason to ask that the money be made available immediately and Congress evidently agreed because it specifically approved the project on the basis of the engineers' recommendation. The recommendation of the District Engineer was ap-

proved by the Division Engineer, the Board of Engineers of Rivers and Harbors, and the Chief of the Engineers (Fdg. 8, R. 25).

Congress had before it all the facts as to the nature of the injury which would be suffered by these landowners, and consequently, could not have intended anything other than payment as recommended. Counsel for the Government takes the position that this was merely permission on the part of Congress for the engineers to adjust these claims. But that is not what the District Engineer recommended. He did not ask that the Secretary of War be given any discretion in the matter. He simply requested Congress to give the Secretary of War authority to purchase the low-lying lands and that it provide the money to do this with, which Congress did. The Act of August 26, 1937, 50 Stat. 844, 848, provided that the existing project "is hereby modified in accordance with the recommendation of the District Engineer" (R. 26). Undoubtedly a Federal Statute waiving Immunity of the Government must be clear. But the fact that it is short does not make it any less clear. Certainly the Secretary of War could not defeat the purpose of Congress by refusing to purchase or condemn if he nevertheless proceeded to do what Congress directed and thus injured the land without paying the compensation.

One of the cases cited by Government's counsel in the original argument of this case was *Dismuke* v. *United States*, 297 U. S. 167, where a veteran brought a suit on an annuity. The law under which he sued provided that the Commissioner of Pensions "shall forthwith adjudicate the claim of the applicant". The Commissioner of Pensions had denied the claim and when suit was filed in the Court of Claims the point was made that the Court had no jurisdiction because of such fact. The Court held there was

jurisdiction and stated, ". . . But the power of the administrative officer will not, in the absence of a plain command, be deemed to extend to the denial of a right which the statute creates, and to which the claimant, upon facts found or admitted by the administrative officer, is entitled . . ." (p. 172). There the Commissioner of Pensions was specifically given the power to adjudicate. Yet it was held he could not defeat the desire of Congress.

Mitchell et al. v. *United States,* 267 U. S. 341, is cited as holding that there can be no recovery. In that case, the suit involved was for injury to a business, not to land. The land in fact had been paid for. The Court specifically held, " . . . The claim now asserted is on account of property other than that for which the Act provided that compensation should be made. . . ." (p. 344). It further stated, ". . . The Act authorized the taking only of land and appurtenances and improvements attached thereto." The Act respondent relied upon specifically provided for the taking and payment for this very land.

In *United States ex rel.* v. *Wilbur,* 283 U. S. 414, the Secretary of the Interior had refused to grant a license to exploit oil on Government property, the statute permitting him to grant such a license. Mandamus was brought to compel the issuance of the license. The Court properly held that the Secretary of the Interior had a discretion in this matter and could not be made to issue the license by mandamus. That case is certainly not applicable here.

The second point made by the Government in reference to this claim is that the Act of Congress provided for the taking of 1,254 acres and the payment for tiling and drainage of the 366 acres, and that the Court in this case merely allowed compensation for an easement which does not provide title in the Government. And on the

same theory it contends that as the Act of Congress allowed compensation for 1,620 acres and the Court found depreciation in value in only 1,107.96 acres, the judgment does not cover the same land.

If Congress authorized the taking of 1,620 acres of land, could it be contended that the War Department did not have the right to bring condemnation for 1,100 acres if it decided that was all it needed? Or would anyone say that if Congress authorized taking the fee and the War Department decided it needed only an easement, that it could not bring condemnation for an easement? If this is true then the War Department certainly does not have the right to injure the land without bringing condemnation and then assert that respondent has no right to recover because the injury was less than they had figured it would be. As stated in the *Cress* case:

> . . . Where formal proceedings are initiated by the party condemning, it is usual and proper to specify the precise interest taken, where less than the fee. But where, as in this case, the property-owner resorts to the courts, as he may, to recover compensation for what actually has been taken, upon the principle that the Government by the very act of taking impliedly has promised to make compensation because the dictates of justice and the terms of the Fifth Amendment so require. . . and it appears that less than the whole has been taken and is to be paid for, such a right of interest will be deemed to pass as is necessary fairly to effectuate the purpose of the taking; and where, as in this case with respect to the six and six-tenths acres, land is not constantly but only at intervals overflowed, the fee may be permitted to remain in the owner, subject to an easement in the United States to overflow it with water as often as necessarily may result from the operation of the lock and dam for purposes of navigation. (243 U. S. p. 329)

The contention is also made that in some way this theory of respondent would enlarge the scope of the judgment. Respondent has received the judgment for the limited amount found and has not brought certiorari and the petitioner's rights have been found. There is no way in which the respondent could recover a larger amount or claim any further compensation. It is inconceivable on what theory respondent could impose upon the United States the amount of $93,540, when its judgment is for only $22,519.16, and is final as to respondent.

The United States will not obtain fee title to the 1,254 acres but neither is it paying for the fee title to 1,254 acres and it cannot be asserted that 1,620 acres of land have been acquired when the judgment simply allows an easement on 1,107.96 acres. The fact that less acres are found to be reduced in value than the engineer asserted does not mean it is other land.

IV. THE UNITED STATES IS LIABLE UNDER TUCKER ACT BECAUSE THERE WAS A CONTRACT TO PAY IMPLIED IN FACT

There is a further basis for this claim founded upon the recommendation of the District Engineer and the approval of same by Congress. Under the Tucker Act the Court of Claims has jurisdiction and the Government is liable for claims founded "upon any contract, express or implied, with the Government of the United States." The action of the Army Engineers and Congress in approving their action certainly constitutes an implied contract to pay for this land, if the land was injured thereby, even if the question whether or not it constitutes a taking is eliminated.

CONCLUSION

". . . The Fifth Amendment," said this Court in *United States* v. *Dickinson*, 331 U. S. 745, p. 748, "expresses a prin-

ciple of fairness and not a technical rule of procedure enshrining old or new niceties . . .". Considered as a rule of fairness the Fifth Amendment requires compensation here. The trend of judicial thought is toward paying compensation where injury is done by the Government. This also is the trend in legislative thinking in this country and in England, as evidenced by the Federal Tort Claim Act[8] and the English Crown Proceeding Act, 1947[9] under which suit may now be brought in England against the Crown.

In the report made by the Chief of Engineers in response to one of the resolutions offered in Congress, he said that, in this project, the damages are small with respect to the project as a whole but serious with respect to the people whose lands were affected.[10] We respectfully submit that this will prove true in most instances where the land taken is back in the country in the rural districts. But of one thing we can be sure. It will prove serious and ruinous to the man operating a farm some distance away from the river.

The payment of $22,500 or $30,000, the amount of the judgment in this case, would be very small indeed compared to the expense of the Government project involved. But the establishment of the precedent sought here, the extension of the rule applicable to land on navigable rivers to that on nonnavigable streams, contrary to the present settled rule, will be very far-reaching indeed, for it will mean that many farmers, large and small, will face the prospect and a very definite prospect, of having their farms

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[8]Act of Aug. 2, 1946, c. 753, Title IV, 60 Stat. 842; Act of Aug. 1, 1947, c. 446, 61 Stat. 722.

[9]10 and 11 George 6, c. 44.

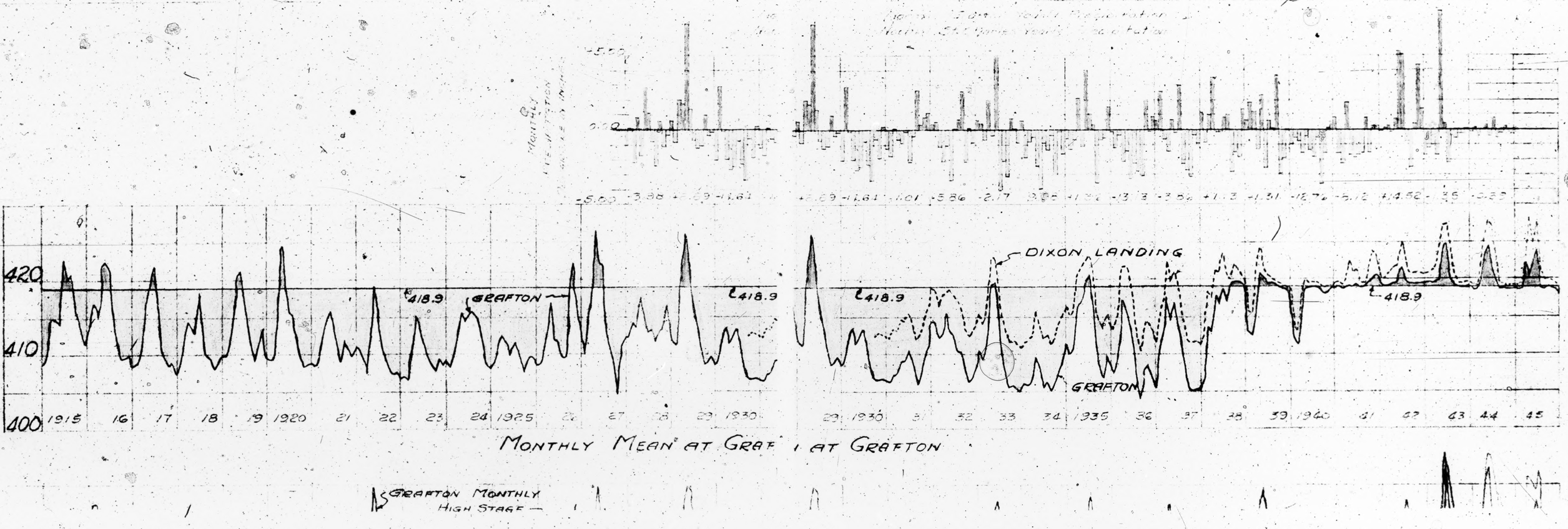
[10]Document No. 34, 73rd Congress, 2nd Session, p. 3.

destroyed or seriously impaired in value without being paid a dime of compensation and through no fault of their own.

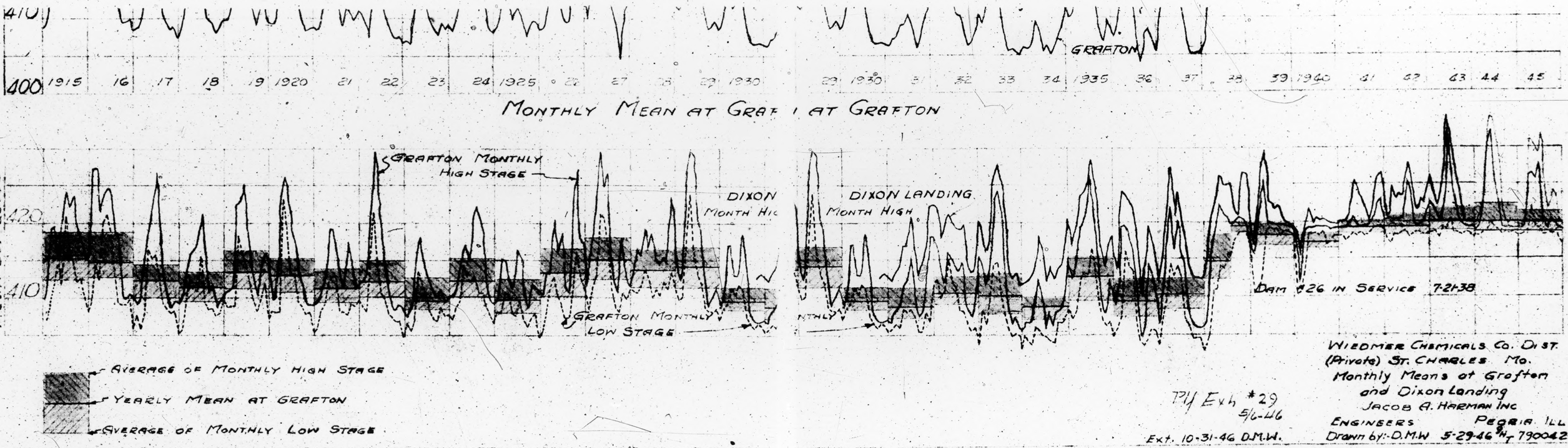
When the social values are weighed, as they should be, it will be found that the expense to the Government in paying for these lands will be small indeed as compared with the harm done by a policy of destroying or injuring land without compensation when equity and fairness are all in favor of paying for it.

It is respectfully submitted that on the basis of precedent, reason, and social value, the rule for which respondent contends, should be reaffirmed.

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